IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 856

ANDREW BERGOTY,

Petitioner,

vs.

PETER GAMBERA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

VERNON SIMS JONES,
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PETITION FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Andrew Bergoty, prays that a writ of certiorari be issued to review a decree of the United States Circuit Court of Appeals for the Second Circuit, entered on December 29, 1942 (86), which decree reversed a final decree of the District Court of the United States for the Southern District of New York, dismissing the above entitled case on the ground that the plaintiff had failed to prove a cause of action (56, 57), and remanded the case for further proceedings in accordance with the opinion of the Circuit Court (76, 86).

PROCEEDINGS.

Peter Gambera filed a libel in admiralty in the United States District Court for the Southern District of New York, alleging that at the Port of Trenton, New Jersey, he joined the Greek Steamship *Emmy* on the 21st day of December, 1939, as a fireman, for a voyage from that port to Norfolk, Virginia, and that he was injured on December 23, 1939, because of the unseaworthiness of the vessel and the negligence of the agents, servants and employees of the petitioner (3-6).

It was specifically alleged in the libel that the Steamship *Emmy* flew the Greek flag, was registered at its home port in Greece, and that the petitioner, Andrew Bergoty, owned, operated and was in possession and control of the said steamship (3, 4, 28). It later appeared that the petitioner, Bergoty, was a Greek national (7, 9, 56).

The petitioner made a motion asking the court, in its discretion, to decline jurisdiction on the ground that two aliens were involved and that adequate and full relief was afforded to the libelant under the laws of the Kingdom of Greece (7). One of the affidavits submitted in support of this motion asserted that under Greek law the seaman-libelant was entitled on being injured to an indemnity based upon the degree of his incapacity and the wages he had been receiving (11).

The court denied the petitioner's motion, with an opinion (18, 19, 20, 21). 1940 A. M. C. 632.

Thereupon, the petitioner made a motion that the libelant be compelled to elect whether he was proceeding under the Jones Act, viz: Section 33 of the Merchant Marine Act of 1920 (46 U. S. C. §688), or for unseaworthiness (21, 22). The act referred to is expressly made elective. Its text

will be found on page 6 of this petition. The court granted this motion without deciding the question of whether the Jones Act actually applied (24, 25).

Thereupon, the libelant filed an amended libel in which he expressly elected to proceed under the provisions of the Jones Act (28-31). It appeared that the accident had occurred while the vessel was proceeding through U. S. waters en route to Norfolk and New York (14).

At the trial, the libelant proved that he was an alien, a citizen of Italy who had never been naturalized, but had lived here for twenty years (38, 39). The court dismissed his libel on the ground that he had made a binding election to sue under the Jones Act and had no cause of action under that act because the vessel was a Greek vessel, the libelant an alien seaman, and the owner of the vessel a Greek citizen (56, 57). The court relied upon the decision of the United States Circuit Court of Appeals in *The Paula*, 91 F. 2d 101, cert. den., 302 U. S. 750 (48).

Gambera appealed to the Circuit Court of Appeals, which reversed the District Court in an opinion reported at 132 F. 2d 414 (74-76). Thereafter, the petitioner asked for a rehearing, which caused the court to reconsider the matter (76-84). A second opinion was written *per curiam* in which the court noted some errors in its previous opinion but adhered to the result and denied the petition for rehearing (84, 85). Not yet reported.

The decision of the Circuit Court of Appeals is not final, but this court has a discretion which it may exercise at this juncture. It is believed that the respondent seaman will not urge as a ground for denying the petition that the decree of the Circuit Court is not final.

This court recently granted a petition in similar circumstances where the decree was not final in the case of

Waterman Steamship Corporation v. *David E. Jones,* October Term, 1942, No. 582. In that case also the seaman had been dismissed in the District Court but had prevailed on appeal. The case had been ordered remanded to the District Court for further proceedings when this court granted certiorari.

The opinion of the United States Circuit Court of Appeals was written on December 10, 1942, the petition for rehearing was decided on December 28, 1942, and the order for mandate is dated December 29, 1942.

The jurisdiction of this court to review this case on a writ of certiorari is provided by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 928 (28 U. S. C. A., Section 347 (a)).

Opinion Below.

The Circuit Court of Appeals applied the Jones Act to the libelant because he had been living in the United States, had signed ship's articles in the United States, and had been hurt in territorial waters of the United States, although on a Greek vessel at the time. Solely because the seaman had been living in the United States, the court referred to him as an "American seaman", although, actually, he was an unnaturalized Italian. Thus, by means of the device of applying to the libelant a designation which formerly had been applied only to American citizens or to seamen serving on American ships, and which did not fit the libelant, the court constructed a case which seemed to call for the application of American Law.

At the same time, the court went further and held that the Jones Act applied in general to foreign vessels within

the United States, *i. e.*, to foreign seamen injured on such vessels. The reason for this was that to the court there appeared to be no obstacle to such an application of the statute. In so holding, the Circuit Court relied on a misconception of the holding and the language of this court in the case of *Uravic* v. *Jarka Company,* 282 U. S. 234. That was a case which dealt with longshoremen injured while working on foreign vessels within the United States. Although this court expressly left open the law with respect to members of the crews of foreign vessels within the United States, the Circuit Court has proceeded on the assumption that this court decided in that case that members of the crews of such foreign vessels are to be given the same legal classification as local longshoremen. Thus, the Circuit Court said:

> "We see nothing in the definitory section (§713, Tit. 46 U. S. Code) to limit the application of the Act to American ships or American citizens. As to ships *Uravic* v. *Jarka Company, supra,* was an express answer and thereafter the definition no longer offered an obstacle to including foreign seamen."

Because one obstacle to inclusion of foreign seamen was removed, the court jumped to the conclusion that there were no others. Accordingly, it thought that, if the act applied to any foreign seamen at all, it must apply to alien or foreign seamen resident in the United States.

Questions Presented.

This case raises an important question involving the application of the Jones Act to seamen on foreign vessels. The Jones Act, Section 33 of the Act of June 5, 1920 (46 U. S. C. 688), provides as follows:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extended the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

The question is whether this statute applies to seamen who are injured on foreign vessels while the vessels are temporarily in the United States.

As applied to the facts of this case, the question is whether a seaman, who is an Italian subject but has been living in the United States, who, in an American port, joins a vessel owned by a Greek national and registered in Greece, and who is injured thereafter on the vessel while it is proceeding through the territorial waters of the United States, bound on a voyage which will take it upon the high seas and ultimately to another American port, is entitled to the benefits of the Jones Act.

Reasons for Granting Petition.

The United States Circuit Court of Appeals for the Second Circuit has decided a question which has never previously been passed upon by this court. This question was

expressly left open in two prior decisions of this court, viz.: *Plamals* v. *S.S. Pinar Del Rio, etc.,* 277 U. S. 151, and *Uravic, admx.* v. *F. Jarka Company Incorporated, et al.,* 282 U. S. 234.

The courts of New York State have decided the same question in a different way. *Clark* v. *Montezuma Transportation Company Ltd.,* 217 A. D. 172; *Resigno* v. *F. Jarka Co., Inc.,* 248 N. Y. 225, at pp. 233, 241.

The United States Circuit Court of Appeals for the Sixth Circuit has decided a similar question and reached a different result in *Grand Trunk Ry. Co.* v. *Wright,* 21 F. (2d) 814, affirmed on a different ground, 278 U. S. 577. That decision is based on principles which are irreconcilable with the law announced in the case at bar.

The question of the scope of the Jones Act has been before lower courts in a number of cases where the questions were related to those involved in the present case. In all these cases, this court has denied certiorari. *The Paula,* 91 F. (2d) 1001, cert. den., 302 U. S. 750; *Hogan* v. *Hamburg-American Line,* 152 Misc. (N. Y.) 405, cert. den., 295 U. S. 749; *Grace Line, Inc.* v. *Toulon,* October Term, 1933, No. 372, cert. den., 290 U. S. 668, reported below without opinion 237 A. D. 982, 262 N. Y. 506.

Questions are constantly arising concerning the application of the Jones Act to seamen on foreign vessels. Such questions concern alien seamen who have signed abroad and are hurt in United States waters, *The Paula,* 91 F. (2d) 1001, cert. den. 302 U. S. 750; alien seamen who have signed in the United States and are hurt in United States waters, *Clark* v. *Montezuma,* 217 A. D. (N. Y.) 172; resident alien seamen who have signed in the United States and are hurt on the high seas, *Hogan* v. *Hamburg-American Line,* 152 Misc. (N. Y.) 405, cert. den., 295 U. S. 749; American

seamen (citizens) who have signed in the United States and are hurt in foreign waters, *Maia* v. *Lamport & Holt Ltd.*, 141 Misc. (N. Y.) 140, aff'd 235 A. D. 821; and American citizens who have signed in the United States and are hurt in domestic waters, *Shorter* v. *Bermuda & West Indies S. S. Co., Limited,* 57 F. (2d) 313.

Even before the present case the decisions were inconsistent and there was no clear principle justifying the results. The present decision muddies the waters still further and does so by resort to a fiction. Thus, the court seems to find it necessary to give to the phrase "American seamen" a wholly artificial meaning in order to justify the application of an American statute to one who, actually, is an Italian.

The same kind of an "American seaman" who had signed on a German vessel in the United States was held not entitled to the benefits of the Jones Act in *Hogan* v. *Hamburg-American Line,* 152 Misc. (N. Y.) 405, cert. den., 295 U. S. 749.

The determination of this question has taken on new significance since the recent decision of this court in *O'Donnell* v. *Great Lakes Dredge & Dock Co.,* October 1942 Term, No. 320, where it was held that the Jones Act applies to seamen injured on shore. The rationale of that decision was that Congress was regulating a subject matter viz. a seaman's right to compensation for injuries received in the course of his employment, whether on sea or land, and that this regulation was an incident to the status of the seaman in the employment of his ship.

If unnaturalized aliens are held to be "American seamen" and are entitled to sue under the Jones Act merely because they live here when not engaged in journeys abroad (that is the force of the decision below), then it is a natural

sequel that such an "American seaman" on a Greek vessel would be entitled to recover under the Jones Act for injuries sustained by him on a Greek vessel while it was lying in a foreign harbor, and even while the "American seaman" was ashore performing his duties in a Greek port.

In the instant case, the alien was injured while the vessel was in domestic waters but while it was enroute to the high seas, whence it intended to sail to another American port. He might just as well have been injured while the vessel was on the high seas as while it was in the Delaware River. If the reasoning of the court below is accepted, the Jones Act would apply to him while injured on the high seas or even in a foreign port.

The confusion which the present case has added to the law is best understood if its principles are applied to seamen of American and Canadian vessels plying on the Great Lakes and the narrow waters connecting them. At times it is difficult to determine whether the vessels of either nation are actually on their own side of the international line. In such circumstances the question of the application of the Jones Act was solved by the Sixth Circuit Court of Appeals in a way wholly different from the case at bar. *Grand Trunk Ry.* v. *Wright,* 21 F. (2d) 814, affirmed on other grounds 278 U. S. 577. In that case, the Circuit Court of Appeals rejected the notion announced here that the Jones Act applies to a member of the crew employed by a Canadian corporation merely because the accident to him occurred in American territorial waters. Instead, the court followed its former decision announced some years before in *Thompson Towing & Wrecking Association, et al.* v. *M'Gregor, et al.,* 207 Fed. 209. In that case, a Michigan death act was applied to a tort occurring on a

vessel lying in Canadian waters but which was owned by a Michigan corporation.

Seamen and their employers are vitally interested in whether their rights and liabilities depend upon the registry of the vessel, the ownership of the vessel, the nationality of the plaintiff, the country where they sign articles, or the number of years they have been shipping out of the United States.

In cases involving seamen on American vessels, the Jones Act has been applied even though the tort occurred while the American vessel was lying in foreign waters. *Alpha Steamship Corporation, et al.* v. *Cain,* 281 U. S. 642.

This court refused to grant certiorari in a case where the Jones Act was applied by the New York State Courts to a seaman from an American vessel injured upon a lighter lying in a Peruvian harbor, where the lighter itself was registered under Peruvian laws. *Grace Line, Inc.* v. *Toulon,* 237 A. D. 892, cert. denied 290 U. S. 668.

Thus, it appears that the Jones Act applies to accidents on American ships all over the world. This is so because of the special circumstances applicable to vessels and their crews and the international features of their employment. It has long been recognized that international comity is best promoted by the application of the law of the flag to members of crews of vessels temporarily in harbors of other nations. *In Re Ross,* 140 U. S. 453. All seamen, whatever their nationality, are taken to be nationals of the country whose flag their vessel flies. *Rainey* v. *N. Y. & P. S. S. Co.,* 216 Fed. 449, at p. 454. In *Plamals* v. *S.S. Pinar Del Rio,* 16 F. (2d) 984, the court said:

> "That libelant is a Spaniard is immaterial, the case is the same as if he had been an Englishman. *The Hanna Nielson* (C. C. A.), 273 Fed. 171, citing

The Belgenland, 114 U. S. 365, 5 S. Ct. 860, 29 L. Ed. 152."

The general rule applicable to torts other than those occurring on ship board is that territoriality is the sole test of the law which applies. In *New York Central Railroad Company* v. *Chisholm, adm'r.,* 268 U. S. 29, this court applied the general rule and held that the Federal Employers' Liability Act did not apply to the death of an American citizen in Canada.

And, yet, the general rule as stated in the Chisholm case has been held not to be applicable to seamen and particularly alien seamen injured in United States ports. *Grand Trunk Ry.* v. *Wright,* 21 F. (2d) 814, aff'd on other grounds 278 U. S. 577.

If, as has been repeatedly held, there are special circumstances which make it necessary to apply American law to injuries on American ships, both on the high seas and in foreign ports, then it should likewise be necessary for reasons of comity, and, indeed, of necessity, to apply the law of the ship's flag to foreign vessels which are temporarily in our ports and whose crew members are injured while aboard such vessels. This doctrine should prevail despite the fact that the seaman, perchance, might sign his contract here and despite the fact that he might be an American citizen. A fortiori, it should prevail in the case of aliens merely resident here.

Nearly all maritime nations have special laws which apply to the crews of their vessels and which protect them in case of injury. Such laws represent a long standing expression of social policy which has found similar expression in this country only in recent years. Thus, Great Britain has had a compensation law applicable to seamen since 1906, 6 Edward VII, Chapter 58. France has had

such a law since 1898 (see Loi du 9 Avril, 1898; Loi du 29 Decembre, 1905); Italy, since 1904 (see the Law of 31 January, 1904); Germany, since 1902 (see "Seemannsordnung"). Belgium has a law governing its seamen all over the world. Law of December 30, 1929. In the case at bar it was indicated that Greece has such a law (11, 51, 54).

Seamen's rights under the compensation laws of Denmark and Norway have come to the attention of our courts. *Gonzalez* v. *J. Lauritzen*, 1940 A. M. C. 220, not reported elsewhere; *The Ivaran*, 35 F. Supp. 229; 1940 A. M. C. 1390.

If foreign shipowners are to be subjected to the provisions of American statutory law while their ships are in our harbors, or while on the high seas, or in foreign ports, merely because American citizens or alien residents choose to sign on their vessels in United States ports, then the system of laws which has been established by foreign nations for dealing with these problems will be completely unworkable. Often the seamen themselves make contributions to these compensation funds.

Furthermore, if the United States undertakes generally to interfere with foreign laws to the extent indicated, then foreign nations will be led ultimately to do likewise, and American shipowners will be subjected to foreign law when seamen on their vessels are injured in foreign ports or when they sign on vessels in foreign ports and jurisdiction is obtained over the shipowner therein.

If Congress wishes such a result, then there should be no difficulty on its part in saying so. In the absence of

such explicit Congressional provision there is no reason to believe it ever intended it.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued to review the decision below.

ANDREW BERGOTY.

By VERNON SIMS JONES,
Counsel for Petitioner.

Dated, New York, March 25, 1943.

I hereby certify that I have examined the foregoing petition and in my opinion it is well founded and entitled to the favorable consideration of the court and that it is not filed for the purpose of delay.

VERNON SIMS JONES.

BRIEF IN SUPPORT OF PETITION.

POINT I.

THE JONES ACT DOES NOT APPLY TO MEMBERS OF THE CREW EMPLOYED BY ALIEN SHIPOWNERS WHOSE SHIPS ARE REGISTERED ABROAD.

The foregoing is true irrespective of whether the crew member is a citizen of the United States; whether he is an alien resident in the United States; whether he signed articles in the United States; whether the voyage commences here or ends here; and whether the accident happened in territorial waters of the United States.

This court has noticed on two occasions the problem of the application of the Jones Act to alien crew members and alien vessels.

In *Plamals* v. *Pinar Del Rio,* 277 U. S. 151 (1928) a member of the crew of a British vessel sued *in rem* under the Jones Act for an injury occurring to him while the vessel lay in the territorial waters of the United States. The lower court held that the crew members' rights were governed exclusively by British law. This court held that the Jones Act did not grant any right *in rem* even as against an American vessel. With respect to the present question this court said, at page 155:

> "We agree with the view of the Circuit Court of Appeals and find it unnecessary now to consider whether the provisions of Section 33 are applicable where a foreign seaman employed on a foreign ship suffers injuries while in American waters."

In *Uravic Adm'x* v. *F. Jarka Company Inc., et al.,* 282 U. S. 234 (1931) this court held that an American citizen

working as a longshoreman for an American stevedoring corporation, who had been injured in the harbor of New York on board a German vessel was entitled to the benefits of the Jones Act. On the other hand, with respect to members of the crew the court said, page 241:

> "If it should appear that by valid contract or special circumstances seamen on a foreign ship should not be protected by the statute it will be time enough to consider the exception when it is presented. But the purport of the words is plain and there is no reason to deny stevedores the benefit of them even if exceptions to the rule for seamen may be found upon peculiar facts."

In the course of its opinion in that case this court referred to the longshoremen whose legal rights were being defined as "American citizens", "those who work in our harbors", "American workmen", and "Americans momentarily on board a private German ship in New York." Nowhere in the opinion did the court refer to such longshoremen as "American seamen". Instead, the court said that such longshoremen had the rights of "American seamen".

Furthermore, this court did not use any of the foregoing appellations with respect to the members of the crew of the vessel involved in that case. Instead, wherever such crew members were referred to by the court, the expression used was "seamen on a foreign vessel", "seamen on a foreign ship", and "seamen upon a German vessel". Obviously, such seamen members of the crew were all in the same category so far as the law applicable to them was concerned, and there was nothing in the mind of the court concerning any distinction among members of the crew based either on their citizenship, their place of residence, or the country where they were when they happened to join the foreign vessel.

Nevertheless, shortly after the rendition of the Uravic opinion, some lower courts seized upon the expression which this court had used with respect to longshoremen, viz.: that such "American citizens" have the rights of "American seamen", and used this expression as a sort of mechanical pointer by which one could determine whether a crew member employed by an alien on an alien vessel was entitled to the benefits of the Jones Act.

Among these cases was *Shorter* v. *Bermuda & West Indies S. S. Company, Ltd.*, 57 F. (2d) 313, where the Jones Act was held applicable to a member of a crew of a foreign vessel owned by an alien, who had signed articles in an American port and was injured in an American port. The court stressed the fact that the seaman was an American citizen and, therefore, an "American seaman".

Thereafter, a contrary result was reached in the case of an alien seaman who had signed articles abroad but was injured in an American port on board a foreign vessel owned by an alien. He was not an "American seaman". *Buda* v. *S.S. Magdapur & T. & J. Brocklebank, Ltd.*, 3 Fed. Supp. 971.

A similar ruling was made by the United States Circuit Court of Appeals for the Second Circuit in *The Paula*, 91 F. (2d) 1001, cert. den., 302 U. S. 750.

However, in the case of *Hogan* v. *Hamburg American Line*, 152 Misc. (N. Y.) 405 (1935), the state court refused to apply the Jones Act to an alien resident of the United States who was just as much or just as little an American seaman as the respondent here. He had signed articles on a German vessel while in the United States for a trip to foreign ports and return to the United States but was injured on the high seas. Hogan, like the seaman in the case at bar, had declared his intention to become a citizen

of the United States and had resided here for over fifteen years. This court denied certiorari, 295 U. S. 749.

In the case at bar, the Circuit Court of Appeals, without noticing the distinction between a longshoreman and a member of the crew, lost sight of the caveat which this court had announced in the *Uravic* case with respect to members of the crew.

With respect to longshoremen this court in the *Uravic* case had adopted the exclusive test of territoriality. However, in a number of places in that opinion this court gave warning that territoriality was not, necessarily, the test to be applied in the case of a member of the crew. It spoke of instances "* * * when for some special occasion this country adopts a foreign law as its own". It mentioned "valid contract", and "special circumstances", and exceptions to the territorial rule "for seamen * * * upon peculiar facts". The whole question was specifically left open for future decision by this court, but the Circuit Court of Appeals proceeded on the theory that the *Uravic* case decided the question.

It can hardly be doubted that what was in the mind of the Supreme Court in using such language with respect to a member of the crew was the doctrine of comity, made necessary by the international aspects of the seamen's profession. In both the *Uravic* and the *Plamals* cases, the court's attention had been called to numerous decisions announcing the rule that a seaman who signs on a foreign vessel, regardless of the port where his contract is signed, becomes for purposes of his relationship with the vessel and his employer, a citizen or subject of the nation whose flag the vessel flies, and that the laws of such vessel follow it around the world and even into the ports of nations foreign to the flag.

This doctrine was announced in *In re Ross*, 140 U. S. 453. Lower courts have applied the doctrine to suits by

crew members to recover against their shipowners for torts. In *Rainey* v. *N. Y. & P. S. S. Co.,* 216 Fed. 449 (1914), the Circuit Court of Appeals for the 9th Circuit said, page 454:

> "* * * When Rainey, although a citizen of the state of Washington, went before the British consul at Seattle and signed the shipping articles, and thereupon stepped upon the British ship flying the British flag as a member of its crew, as the record shows he did, he stepped upon British territory and became entitled to the protection and benefit of all British law in behalf of British seamen, and subject to all of its obligations and liabilities."

Rainey was employed by an American corporation which had chartered a British vessel on a demise or bare boat basis and the accident to Rainey had occurred while the vessel was lying in a Peruvian harbor.

It was because of this well settled doctrine that the New York courts denied relief under the Jones Act to an "American seaman" who had joined a British vessel as a member of the crew while it lay in the harbor of New York and who was injured before the vessel departed from New York. *Clark* v. *Montezuma,* 217 A. D. (N. Y.) 176. In that case the crew member had not signed articles but the court treated him as a member of the crew, which he was.

In *Resigno* v. *F. Jarka Co. Inc.,* 248 N. Y. 225, at 241, the New York Court of Appeals said, per Judge Crane, with respect to Clark, "He ceased for the time being to be an American seaman".

In *Plamals* v. *Pinar del Rio,* 16 F. 2d 984, the Circuit Court of Appeals said:

> "That libelant is a Spaniard is immaterial, the case is the same as if he had been an Englishman

> (The Hanna Nielsen, C. C. A. 273 Fed. 171, citing the Belgenland, 114 U. S. 355)."

In *The Belgenland,* this court said, at page 367:

> "* * * whoever engages voluntarily to serve on board a foreign ship necessarily undertakes to be bound by the law of the country to which such ship belongs, * * *."

The rule that our courts will not apply our law to aliens who are temporarily here as crew members on foreign vessels is an outstanding exception to the general rule of territoriality as applied in the *Uravic* case in the case of longshoremen. It was there recognized as a possible exception.

A pertinent illustration of the application of the general rule of territoriality is to be found in the case of *New York Central Railroad* v. *Chisholm,* 268 U. S. 29. There the crew of a train, subject to the Federal Employers' Liability Act, were hired in the United States by an American corporation and in the course of their employment ran the train into Canada. While it was in Canada, Chisholm, an employee, was killed. His widow tried to recover under the Federal Employers' Liability Act, but this court held that the statute had no extra territorial effect.

The Circuit Court of Appeals for the Sixth Circuit has recognized that the *Chisholm* decision has no application to members of the crews of vessels. They, as already stated, fall within the exception to the rule. *Grand Trunk Ry.* v. *Wright,* 21 F. (2d) 814 (1927). Affirmed on other grounds, 278 U. S. 577.

The doctrine that the law of the ship's flag applies all over the world and in foreign ports, has been adopted by our courts with respect to injuries to seamen on American

vessels while lying in foreign harbors. In *Alpha Steamship Corp.* v. *Cain*, 281 U. S. 642, the Jones Act was applied to an injury received by a seaman on an American vessel while it was tied to a dock in a Venezuelan port.

In *Grace Line, Inc.* v. *Toulon*, 237 A. D. 982; 262 N. Y. 506, the Jones Act was applied to a crew member of an American vessel who was injured while he was temporarily upon a Peruvian lighter lying in a Peruvian port. The American employer in that case petitioned this court for certiorari on the express ground that the territoriality rule announced in the *Chisholm* case should be applied to a seaman and should defeat application of the Jones Act. This court denied certiorari, 290 U. S. 668.

That this rule is a reciprocal one and applies as well to foreign vessels while in our harbors as it does to our vessels while in foreign harbors has been recognized by the lower courts. *Clark* v. *Montezuma Transportation Company, Ltd.*, 217 A. D. 172; *Wenzler* v. *Robin Line S.S. Company*, 277 Fed. 812, *Plamals* v. *Pinar Del Rio*, District Court opinion, not reported, but to be found in transcript of record filed in the Supreme Court, October, 1927 Term, No. 225, at page 81, *et seq.*

In *Bennett* v. *Connolly*, 122 Misc. (N. Y.) 149, affirmed 208 A. D. 852, the court said at page 150:

> "I shall follow the rule stated by U. S. District Judge Cushman in *Wenzler* v. *Robin Line S.S. Co.*, 277 Fed. Rep. 812. It seems to me that the conclusion there reached is based upon reason and justice. It means that as long as the seaman is aboard his vessel the obligations of the owner to him as to torts are measured by one law—the law of the flag."

In *U. S. Shipping Board Emergency Fleet Corporation, et al.* v. *Greenwald*, 16 F. (2d) 948, the Circuit Court of Appeals for the Second Circuit said, page 951:

> "Jurisdiction and the laws of the nation accompany the ship, not only over the high seas, but also in the ports and harbors, and everywhere else they may be water-borne. United States *v.* Rodgers, 150 U. S. 249."

The doctrine has its basis not only in comity but also in necessity as well. It is, indeed, a vital doctrine to two nations situated as are the United States and Canada on either side of the Great Lakes and smaller tributary waters. The Circuit Court of Appeals for the Sixth Circuit in *Thompson Towing & Wrecking Association* v. *McGregor*, 207 Fed. 209 (1913), rejected the doctrine of territoriality as determining the law applicable to a death occurring upon an American vessel while lying in Canadian waters. It adopted, instead, the exception to the rule which is here advocated, and applied the law of the State of Michigan where the vessel was owned. Any other doctrine was declared to be unworkable. The court said at page 219:

> "* * * It is manifest that such a constructive extension of territorial sovereignty as to matters occurring on board a ship domiciled and situated as the Stewart was, and not involving the peace, dignity, or tranquillity of the nation in whose waters she was lying, rests upon the necessities, not to say the comity, of nations whose conventional boundaries adjoin in navigable waters. This is well illustrated by a portion of the opinion below:
>
> 'If the proper conclusion in this case was doubtful, I should hesitate to decide that the existence of this liability depended upon a few minutes of time or a few feet of distance, as would be the case with a vessel situated nearly upon the line and frequently crossing and recrossing; or that upon this subject there could be one rule upon the Stewart and another rule upon the Merrick; or that there might be one rule forward and another aft, on the same boat'."

It was because of this situation that the same Circuit Court in *Grand Trunk Ry.* v. *Wright,* 21 F. 2d 814, refused to apply the Jones Act to a member of the crew injured in American territorial waters on board a vessel owned by an American corporation but which was "owned" under demise or bareboat charter by the seamen's employer, a Canadian corporation.

In the *Uravic* case, this court found no reason for rejecting the general rule of territoriality in the case of a longshoreman. However, the court expressly noted a difference between the case of a longshoreman and a member of the crew. The "special circumstances" which it there mentioned undoubtedly had reference to the foregoing doctrine.

Although the words of the Jones Act are general, there is nothing in its language, or elsewhere among the statutes of the United States, which compels an application of the Jones Act in the case of alien seamen injured on foreign vessels owned by aliens. The farthest the Congress has gone, according to the holdings in several cases, is to require the application of the Jones Act in the case of injuries to seamen employed by American citizens on vessels registered in foreign countries. This result is reached by a debatable construction of 46 U. S. Code, Section 713 and is illustrated by such cases as *Gerradin* v. *United Fruit Co.,* 60 F. 2d 927 C. C. A. second, cert. den., 287 U. S. 642, and *Torgerson* v. *Hutton,* 243 A. D. 31 affirmed 267 N. Y. 535, cert. den., 296, U. S. 602. Those cases are wholly unrelated to the problem here presented.

Cunard Steamship Company v. *Mellon,* 262 U. S. 100 is not an authority to the contrary. In that case both the Constitutional amendment and the enactment of Congress clearly stated that the Prohibition Law should be effective

in "all territory subject to the jurisdiction" of the United States. Even with such words present in both the Constitution and the statute, two Justices registered a strong dissent against applying the law to foreign vessels while in our harbors. In the Jones Act there are no words whatever which require a full territorial application.

Conceding that Congress had the power, if it wished to exercise it, to make the Jones Act universally applicable throughout American territorial waters, it should not be held that Congress has exercised the power in violation of the well settled rule of international law and comity. Rather, it must be assumed that Congress had the doctrine of comity in mind when enacting the Jones Act, and chose not to disturb it.

CONCLUSION.

IT IS RESPECTFULLY SUBMITTED THAT THE PETITION SHOULD BE GRANTED.

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